United Parcel Service *and* Sara F. Griffin.

Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 385, AFL–CIO, its Agent *and* Sara F. Griffin. Cases 12–CA–12749 and 12–CB–3028

June 11, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The issue presented is whether Respondent United Parcel Service (UPS) and Respondent Teamsters violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, by executing and maintaining a collective-bargaining agreement in 1987 which extended an existing nationwide bargaining unit to include a group of employees who had historically been excluded from that unit. The judge found that the challenged action involved a lawful accretion.[1] For the reasons set forth below, we find merit in the General Counsel's exceptions to this finding.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions only to the extent consistent with this Decision and Order.

UPS engages in the interstate transportation and distribution of parcels. Prior to 1979, approximately 220 local unions of the International Brotherhood of Teamsters had individual bargaining relationships with various UPS facilities located throughout the country. Operations clerks[3] were included in the bargaining unit at some facilities and were excluded from the unit at other facilities.

In 1979, UPS and the Teamsters executed their first National Master Agreement consolidating all previously represented units into a single nationwide bargaining unit. Article 1, section 2, of that agreement was entitled ''Employees Covered'' and stated ''Employees covered by this Agreement shall be construed to mean, where already recognized . . . clerks.'' The term ''clerks'' referred to operations clerks.

Approximately 40 percent of UPS operations clerks had not previously been represented in a recognized Teamsters bargaining unit when the 1979 National Master Agreement was executed. Notwithstanding the contract reference to coverage of clerks ''where already recognized,'' the Union asserted that all operations clerks should be covered by the 1979 agreement. The contrary view of UPS prevailed in practice, however, so that previously unrepresented operations clerks were excluded from the nationwide unit.

During negotiations for a new National Master Agreement in 1982, the Union proposed deletion of ''where already recognized'' from the ''Employees Covered'' section. UPS rejected this proposal. The language of that section in the new 1982 agreement remained the same as in its predecessor. Consequently, previously unrepresented operations clerks continued to be unrepresented.

On August 1, 1987, the parties executed a new 3-year National Master Agreement. This time the Union prevailed in its effort to include all operations clerks in the bargaining unit. The relevant portion of article 1, section 2, of the new contract contained revised language effectively recognizing the bargaining unit status of all UPS clerks. Those clerks who worked in States without ''right-to-work'' laws were obligated to comply with the new contract's union-security provisions.

At the time of the new contract's execution, UPS employed over 5000 operations clerks nationwide. It is undisputed that the functions of clerks excluded from the unit until 1987 were at all times the same as the functions of clerks traditionally included in the unit. It is also undisputed that the Employer did not ask for and the Union did not proffer proof of majority support for the Union in the group of previously unrepresented employees. An official of the Union testified about his belief that the Union had majority support in this group, but he admitted that he had no ''papers,'' including authorization cards, to support this belief. The overall nationwide bargaining unit had more than 100,000 employees in 1987.

The Respondents contend that their expansion of the unit to include previously unrepresented operations clerks was a lawful accretion. As found by the judge, traditional community-of-interest factors relevant to the Board's analysis of accretion issues weigh heavily in favor of finding an accretion. The General Counsel contends, however, that the traditionally unrepresented group of operations clerks could not lawfully be accreted to the unit. In support of this contention, the General Counsel relies on the well-established Board principle precluding accretion where ''the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an

[1] On July 27, 1990, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents filed briefs in opposition to the General Counsel's exceptions and in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The judge granted the General Counsel's motion to strike attachments to the Respondent Employer's posttrial brief on the basis that these attachments were not part of the record. The Respondent Employer has not excepted to the judge's ruling but has appended the same documents to its answering brief. We have again stricken these documents and have not considered them in deciding the issues presented in this case.

[3] The term ''operations clerk'' refers to employees in the following classifications: rewrap clerk, bad address clerk, post card clerk, operating center clerk, air operations clerk, package return clerk, damage clerk, and hub and air-hub return clerks. The general function of operations clerk is to process packages through the system for ultimate delivery to the customers.

ensuing contract, or, having come into existence, has not been part of the larger unit to which their accretion is sought or granted.'' *Laconia Shoe Co.*, 215 NLRB 573, 576 (1974).[4]

In the judge's opinion, the precedent cited by the General Counsel requires both historical exclusion of employees from a unit and acquiescence in that exclusion by the union involved. The judge found that, since the 1979 establishment of the nationwide bargaining unit in this case, the Respondent Union had never acquiesced to the exclusion of operations clerks who were not previously represented in local units. In addition, the judge noted the consensus of all litigant parties here that the Board has not had the occasion to apply the *Laconia Shoe* accretion bar in a case where the group of employees in dispute are not distinguishable by classification, job function, or geographic location from employees who have traditionally been included in the bargaining unit. Under these circumstances, the judge concluded that the historical exclusion of some operations clerks should not preclude their accretion to the existing unit. He therefore found the accretion to be lawful. We disagree.

In furtherance of the statutory duty to protect employees' right to select their bargaining representative, the Board follows a restrictive policy in finding accretion. See, e.g., *Towne Ford Sales*, 270 NLRB 311 (1984). One aspect of this restrictive policy has been to permit accretion only in certain situations where *new groups of employees* have come into existence after a union's recognition or certification or during the term of a collective-bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit that the new employees would, if present earlier, have been included in the unit or covered by the current contract, then the Board will permit accretion in furtherance of the statutory objective of promoting labor relations stability. *Gould, Inc.*, 263 NLRB 442, 445 (1982).

No such accommodation of the collective-bargaining process is required or warranted, however, where the parties to a bargaining relationship have historically failed to include an existing group of employees from a bargaining unit. If a group of employees is in existence when a union is recognized or certified, then the statutory right of those employees to select a bargaining representative can be honored and they can be included in the unit at that time without any disruption of labor relations stability. If a group of employees comes into existence during the term of a contract for an existing unit, then the parties must timely address the unit status of those employees prior to executing a successor agreement. Should they fail to do so, the parties have only themselves to blame for any instability resulting from the existence of a group of employees having interests in common with unit employees but excluded from representation in the unit.

The limitations on accretion discussed above and applied in *Laconia Shoe* and related precedent require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative*. Here, for instance, it is undisputed that prior to 1979 a nationwide group of operations clerks at various UPS facilities were excluded from single-facility units and from 1979 to 1987 this same group of employees continued to be excluded from a nationwide multifacility unit under two successive collective-bargaining agreements. Moreover, although this factor does not affect the result here, the judge erred in finding that the Union had not acquiesced in the exclusion of the disputed group of operations clerks. At the very least, the Union's conscious abandonment of a proposal for the 1982 contract that would have specifically modified the unit to include all operations clerks sufficed to prove its acquiescence in continued exclusion of certain operations clerks during that contract's term.[5]

Based on the foregoing, we find that the previously unrepresented group of operations clerks did not constitute an accretion to the nationwide bargaining unit of UPS employees represented by the Teamsters. Accordingly, we find that the Respondents violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, by executing and maintaining a collective-bargaining agreement in 1987 which extended an existing nationwide bargaining unit to include a group of employees who had historically been excluded from that unit and a majority of whom did not support the Union.

CONCLUSIONS OF LAW

1. The Respondent Employer, by recognizing and entering into a contract with the Respondent Union as the collective-bargaining representative of a bargaining unit including a group of previously unrepresented operations clerks, at a time when a majority of those employees had not designated that Union as their representative, and by tendering to the Respondent Union dues collected from the pay of certain previously unrepresented operations clerks in States where a contractual union-security clause was lawful and operative,

[4] See also *Color Tech Corp.*, 286 NLRB 476, 487 (1987); *King Radio Corp.*, 257 NLRB 521, 525–526 (1981); *Sterilon Corp.*, 147 NLRB 219 (1964).

[5] Compare *King Radio Corp.*, supra at 526 (in successive contract negotiations, union sought extension of unit coverage to other plants but ''always acquiesced'' in respondent employer's position limiting recognized unit to single plant).

has engaged in unfair labor practices within the meaning of Section 8(a)(3), (2), and (1) of the Act.

2. The Respondent Union, by accepting exclusive recognition as the representative of a group of previously unrepresented UPS operations clerks at a time when it was not designated as the exclusive representative by a majority of such employees, and by receiving dues deducted from the pay of certain previously unrepresented operations clerks in States where a contractual union-security clause was lawful and operative, has engaged in unfair labor practices within the meaning of Section 8(b)(l)(A) and (2) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent UPS unlawfully recognized and entered into a collective-bargaining agreement on August 1, 1987, with the Respondent Union as the representative of previously unrepresented operations clerks, we shall order Respondent UPS to withdraw and withhold all recognition from the Respondent Union as the collective-bargaining representative of those employees, and we shall order both Respondents to cease applying to those employees the terms of the Respondents' August 1, 1987 collective-bargaining agreement, or any extension, renewal, modification, or superseding agreement,[6] unless or until the Respondent Union is certified by the Board as such representative.

We shall also order that the Respondent Union and Respondent UPS, jointly and severally, reimburse previously unrepresented operations clerks, present and former, for dues and initiation fees involuntarily exacted from them as a result of the unlawful application of the union-security clause in the Respondents' collective-bargaining agreement, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that

A. Respondent Employer United Parcel Service, Inc., Rockledge, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging membership in Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 385, AFL–CIO, its agent, by recognizing it as the exclusive representative of a group of previously unrepresented operations clerks at a time when the labor organization has not been designated by a majority of those employees as their representative.

(b) Applying the terms of its collective-bargaining agreement of August 1, 1987, or any other agreement with the Union, to previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withhold and withdraw all recognition from the Respondent Union as the exclusive representative of previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

(b) Jointly and severally with the Respondent Union, reimburse all previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them pursuant to application of a union-security clause in the Respondents' collective-bargaining agreement executed on August 1, 1987, or any other agreement between the Respondents, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at all facilities employing unrepresented operations clerks copies of the attached notice marked ''Appendix A.''[7] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

[6] Nothing in this decision should be construed as requiring Respondent UPS to rescind benefits conferred on the group of previously unrepresented operations clerks as the result of the unlawful application of contract provisions to them.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Employer has taken to comply.

B. Respondent Union Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 385, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting exclusive recognition as the representative of all previously unrepresented operations clerks of the Respondent Employer, at a time when it was not designated as the exclusive representative by a majority of those employees.

(b) Applying the terms of its collective-bargaining agreement of August 1, 1987, or any other agreement with the Respondent Employer, to previously unrepresented operations clerks, unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Employer reimburse all newly added and previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them pursuant to application of a union-security clause in the Respondents' collective-bargaining agreement executed on August 1, 1987, or any other agreement between the Respondents, in the manner set forth in the remedy section of this remedy.

(b) Post at its business offices serving members at any United Parcel Service facility where previously unrepresented operations clerks are located copies of the attached notice marked ''Appendix B.''[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT encourage membership in Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 385, AFL–CIO, its agent, by recognizing it as the exclusive representative of a group of previously unrepresented operations clerks at a time when it has not been designated by a majority of those employees as their representative.

WE WILL NOT apply the terms of our collective-bargaining agreement of August 1, 1987, or any other agreement with the Union, to previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withhold and withdraw all recognition from the Union as the exclusive representative of previously unrepresented operations clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL jointly and severally with the Union make whole all previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them and paid to the Union pursuant to application of a union-security clause in the collective-bargaining agreement executed on August 1, 1987, or any other agreement with the Union.

UNITED PARCEL SERVICE, INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accept exclusive recognition as the representative of all previously unrepresented United Parcel Service, Inc. operations clerks at a time when

we are not designated as the exclusive representative by a majority of those employees.

WE WILL NOT apply the terms of our collective-bargaining agreement of August 1, 1987, or any other agreement with United Parcel Service, Inc. to previously unrepresented operations clerks, unless and until we have been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with United Parcel Service, Inc. make whole all previously unrepresented operations clerks for any initiation fees, dues, or other moneys involuntarily exacted from them and paid to us pursuant to application of a union-security clause in the collective-bargaining agreement executed on August 1, 1987, or any other agreement with United Parcel Service, Inc.

TEAMSTERS NATIONAL UNITED PARCEL SERVICE NEGOTIATING COMMITTEE AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 385, AFL–CIO, ITS AGENT

Peter J. Salm and *Michael R. Maiman, Esqs.*, for the General Counsel.
Martin Wald and *Edward J. McBride, Jr., Esqs.*, of Philadelphia, Pennsylvania, for the Company.
A. E. Lawson, Esq., of Washington, D.C., for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. These cases were tried before me at Orlando, Florida, on January 8 and 9, 1990, pursuant to an order consolidating cases, consolidated complaint, and notice of hearing (complaint) issued by the Acting Regional Director for Region 12 of the National Labor Relations Board (Board) on April 25, 1989, which in turn was based on charges filed by Sara F. Griffin, an individual (Griffin). An amendment to the complaint was issued by the Acting Regional Director on September 26, 1989. The charge in Case 12–CA–12749 was filed on November 3, 1987. The charge in Case 12–CB–3028 was also filed on November 3, 1987, and amended on December 22, 1988. The complaint alleges that United Parcel Service (Company) on or about August 1, 1987, violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (Act) by recognizing Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 385, AFL–CIO (Union), its agent, as the collective-bargaining representative of certain previously unrepresented operations clerks at the time when a majority of those employees had not designated the Union as their collective-bargaining representative and by tendering to the Union dues collected from the pay of certain previously unrepresented operations clerks pursuant to a union-security clause in non-right-to-work states. It is also alleged the Union violated Section 8(b)(1)(A) and (2) of the Act by receiving dues deducted from the pay of certain previously unrepresented operations clerks in non-right-to-work states pursuant to a union-security clause at a time when the Union did not represent a majority of certain previously unrepresented operations clerks and by causing the Company to discriminate against certain of its employees in violation of Section 8(a)(3) of the Act.[1] The Company and Union filed answers admitting certain complaint allegations but denying the commission of any unfair labor practices .

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which I have carefully considered, were filed on behalf of the General Counsel, the Company, and the Union.[2]

On the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio and New York corporation, has offices and places of business in various States including its place of business located at Rockledge, Florida, where it is engaged in the interstate transportation and distribution of parcels. During the 12-month period preceding issuance of the complaint, a representative period, the Company, in the course and conduct of its business operations, performed interstate freight transportation services valued in excess of $50,000. During that same period, it received gross revenues in excess of $500,000 as a link in the interstate movement of freight. The complaint alleges, the parties admit, the evidence establishes, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, it is admitted, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The complaint also contained alleged independent violations of Sec. 8(b)(1)(A) of the Act. However, those allegations were served from the complaint at trial and resolved pursuant to an informal settlement agreement that I approved prior to close of the hearing

[2] On March 19, 1990, counsel for the General Counsel filed a motion to strike attachments to Respondent Employer's posthearing brief and all references Thereto. In the motion, counsel for the General Counsel moved to strike certain daily labor reports that were attached to the Company's posttrial brief. Counsel for the General Counsel's contention that such reports were never made a part of the record in this case has merit. Accordingly, I shall strike the documents appended to the Company's posttrial brief. I have given no consideration to the attachments or references made in the Company's posttrial brief to the attachments.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[3]

Union Local 385 along with approximately 220 other union locals nationwide has represented certain company employees including operations clerks[4] for many years within their respective jurisdictions. The various geographical units were, by practice and consent, merged into a single nationwide bargaining unit. The nationwide unit consists of approximately 108,000 employees. Since 1979, national negotiations have been conducted between the Company and the Union's national negotiating committee that represents all union locals. Between 1979 and 1987, three national collective-bargaining agreements were negotiated with effective dates of 1979, 1982, and August 1, 1987.[5]

Article 1, section 2, of the 1979 National Agreement entitled ''Employees Covered'' reads as follows:

> Employees covered by this Agreement shall be construed to mean, where already recognized, feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clericals, clerks,[6] mechanics, maintenance personnel (building maintenance), car washers, and other employees of the Employer for whom a signatory Local Union is presently the bargaining representative.
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> The provisions of this agreement shall apply to all accretions to the bargaining unit in the classifications listed in the applicable individual Supplements.

Morton testified there probably were more than 1000 but less than 5000 operations clerks utilized by the Company at the time the parties entered into the 1979 National Agreement.

The first paragraph of article 1, section 2, of the 1982 national agreement reads as follows:

> Employees covered by this agreement shall be construed to mean, where already recognized, feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clericals, clerks, mechanics, maintenance personnel (building maintenance), car washers, United Parcel Service employees in the employer's air operations, and other employees of the employer for whom a signatory Local Union is or may become the bargaining representative.

The second paragraph of article 1, section 2, of the 1982 national agreement was identical to the second paragraph of article 1, section 2, of the 1979 agreement.

As is noted above, at the time the 1979 contract became effective, some operations clerks throughout the country were represented by the Union in recognized units, while other operations clerks were not. Thus, after 1979, some operations clerks were treated as being covered under article 1, section 2, of the 1979 and 1982 agreements while others were treated as being unrepresented.[7]

Morton testified the Union had always, over the years, taken the position it represented *all* employees having anything to do with the movement of packages from the time the packages were tendered to the Company until such packages were delivered to the customers. Morton testified the Union interpreted the recognition clause of the 1979 contract as covering *all* operations clerks employed by the Company nationwide. Morton stated that although the Company did not share that interpretation of the collective-bargaining agreement by the Union, the Union nonetheless continued to complain about the Company's failure to do so. According to Morton, the complaints were not limited to the national level but union locals also objected that the Company did not treat all operations clerks as being members of the bargaining unit.[8] Morton testified that until the 1987 agreement, the status of all operations clerks ''was a constant bone of contention between the Company and the Union.'' Morton testified that during the 1982 negotiations, one of the proposals made by the Union was to modify the ''Employees Covered'' section of the agreement. The Union's proposal would have changed the recognition clause from:

> Employees covered by this agreement shall be construed to mean, where already recognized, feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clericals, clerks . . . .

To:

> Employees covered by this agreement shall include . . . clerks.

Morton said the Company, however, did not agree to this proposed change in 1982.

Morton testified that during the 1987 negotiations, the Union finally convinced the Company its (Union's) interpretation of the recognition clauses in the 1979 and 1982 agreements was correct and that all operations clerks should properly be considered as being in the bargaining unit.[9] As a result, the second paragraph of article 1, section 2 (which has been quoted above), was changed to read as follows:

> In addition, effective August 1, 1987, the Employer recognizes as bargaining unit members clerks who are assigned to package center operations, hub center operations, and/or air hub operations whose assignment involves the handling or progressing of merchandise after

[3] The facts set forth have been taken from a joint stipulation of facts entered into by the parties, admissions made by the parties, and from credited uncontradicted testimony of certain witnesses whose identity will be set forth al those places in the decision where their testimony is utilized and/or relied upon.

[4] The generic term ''operations clerks'' refers to the classifications of: rewrap clerks, bad address clerks, postcard clerks, operating center clerks, air operations clerks, package return clerks, damage clerks, and hub and air-hub return clerks. Their duties are discussed in greater detail elsewhere in this Decision.

[5] The most recent agreement expires by its terms on July 31, 1990.

[6] Company Air and Midwest Regional Manager Roy Morton (Morton) tesified without contradiction that the term ''clerks'' as used in this agreement referred to ''operations clerks.''

[7] The Company's growth in volume as well as the additional need for operations clerks increased approximately 6 to 7 percent on an annual basis between 1979 and 1987.

[8] Two grievances were filed on May 5, 1980. One each by Local 435 (Denver, Colorado) and Local 46 (location not available in the record), in which the Locals complained the Company refused to recognize the Union as the collective-bargaining representative for the operations clerks. (G.C. Exh. 3).

[9] No specific evidence of majority status was requested by the Company or provided by the Union at the time the 1987 agreement was executed which contained the language pertaining to *all* operations clerks being included in the bargaining unit.

> it has been tendered to United Parcel Service to effectuate delivery. These jobs cover: package return clerks, bad address clerks, postcard room clerks, damage clerks, rewrap clerks and hub and air-hub return clerks. Classifications covered in Article 39-Trailer repair shop are also covered.

There were over 5000 operations clerks employed by the Company nationwide in 1987.[10] Some operations clerks newly included in the unit under the 1987 agreement who were employed in non-right-to-work States, executed bargaining authorization cards and checkoff authorizations and, pursuant thereto, have had dues and initiation fees deducted from their pay by the Company. These dues have been tendered to and received by the Union. The 1987 National Agreement contains a union-security clause that is applicable to the extent allowed by state law.

At this point, a detailed look at the functions of the operations clerks is helpful. The generic term ''operations clerks'' refers to employees who work alongside sorters, loaders, and drivers in processing packages to be transported by the Company. Their job functions include, inter alia, correcting addresses on packages, rewrapping packages, redirecting packages sent to a location by mistake and returning damaged packages with claim forms. Company labor relations staff member Edward R. Lenhart (Lenhart) testified:

> Probably the best way to describe the operation at [the Company] is go through the delivery cycle and then have the fill in or clerical people come into play . . . .
>
> Package driver[s] pick up packages at accounts on a daily basis at their regular customers; they transport those . . . packages into the package center, which may be an independent center housed in its own confines or it may be a center as part of a hub. At that time, the packages are unloaded. The packages are unloaded by a hub person. That hub person then places them on the belt. The packages then go through the sorting belt system to be sorted to the destination trailers.
>
> During any of this portion of the package delivery cycle, clerical people can come into play. If a package is unloaded that needs to be taped, a clerical person, a rewrap person may, with a tape gun, put tape on that package so as to keep the package on its way. If a package is off loaded and the package is damaged, a damage clerk may be involved in rewrapping that package, discovering what's damaged, fill out the appropriate damage reports, causing that package either to go on its way back to the shipper or to a designated place for other treatment, depending on the type of merchandise it is.
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> The packages are then loaded into destination trailers. They are pulled by feeder drivers to the destination center. They are unloaded at the destination center, again, by hub people, placed on belts, loaded by a group of people called the pre-loaders. Pre-loaders can operate off of running belts or off of box lines or cage lines, or whatever the case may be. Those pre-loaders place the packages into package cars for the delivery driver to deliver packages on that particular delivery day.
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> Then the pre-load operation, as well as the unload operation, as well as the sort operation, packages can become damage[d], packages may need rewrapped. Packages may on the pre-load be recognized as having an incorrect address, either missing a digit, having an incorrect zip code, and the clerical people would be involved at that time in correcting the addresses for the pre-loader.
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> Once the packages leave the center, the delivery driver is responsible for making the deliveries. If for whatever reason he cannot make those deliveries, he would then, on his return to the center, indicate to the clerical person who is on duty at that time why he could not affect delivery on certain packages that he returned .
>
> Again, they could have bad addresses that the driver discovered on area; they could be in need of rewraps and the driver chose not to deliver the packages because of the appearance of the package; they could have had damage that he'd noticed and the pre-loaders hadn't noticed; they could have been refused by the consignee and then need to have the appropriate paperworlk filled out for the return; they could be packages that have postcard delivery addresses and the driver's unfamiliar with the consignee and could not affect the delivery, gives it to the return clerk upon his return to the center and they fill out the appropriate paperwork to notify the customer via the US mail, the postcard system; it could be COD's that were refused; it could be—you know, it could be a variety of reasons.
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> . . . .
>
> The air return clerk . . . is one that works in an airhub. . . . Performs the same type of clerical work, but they just have to do with air packages because of his or her location in the airhub.

Lenhart testified without contradiction that the operations clerks work ''shoulder to shoulder'' ''at all times '' with other unit employees. He further testified:

> They converse with them on work related matters, they receive packages from those classifications, they give packages back to those classifications, they ask those classifications for information.

He testified, for example:

> They may ask a driver for information concerning a customer for correction of a bad address. There's so much interplay that, I mean, they're all part of the same team . . . .

Lenhart testified the working conditions for the operations clerks and, for example, the drivers, sorters, loaders, and unloaders are identical. Lenhart said they take their breaks together, adhere to the same grooming standards, share the same locker and personal storage space, and utilize the same lunchroom and parking facilities. The operations clerks and other unit employees are under the same supervision.

[10] Prior to August 1987, the terms and conditions of employment of the unrepresented operations clerks were governed by a clerical employee's handbook, which handbook had no effect on unit employees.

B. *Positions of the Parties*

Counsel for the General Councel urges that the application of the 1987 National Agreement to those operations clerks not covered under the 1979 and 1982 agreements did not constitute a lawful accretion. Counsel for the General Counsel urges the Board follows a restrictive policy in finding an accretion because such a finding forecloses the employees' basic right to select their own bargaining representative. In this regard, counsel for the General Counsel points out that a fundamental consideration in determining accretion issues is to insure employees the fullest freedom in exercising their rights guaranteed by the Act. Counsel for the General does not contend the factors generally militating in favor of a finding of an accretion are not present in the instant case but rather argues there is a factor present in the case subjudice that precludes an accretion finding. Counsel for the General Counsel asserts that where the group sought to be accreted, as he contends is the case here, was in existence at the time of the recognition or certification and not covered in ensuing contracts, the Board will not permit accretion without an election or a showing of majority status. Counsel for the General Counsel argues the fact that some employees in the classifications claimed to be accreted into the unit have always been in the unit should not cause this case to be treated differently than a traditional accretion case and that the preclusion principle should apply. Further, counsel for the General Counsel asserts there is no evidence on this record that the Union represented a majority of the operations clerks at the time all were added to the unit in 1987. Thus, he asserts no lawful basis for the Company's and Union's actions has been demonstrated and a finding that both violated the Act as alleged in the complaint is warranted.

Counsel for the General Counsel, in responding to certain defenses raised or anticipated, contends the plain language in the recognition clauses of the 1979 and 1982 National Agreements defeats any inference the agreements were intended to cover all operations clerks. In support thereof, counsel for the General Counsel points to that portion of the recognition clauses in both agreements that reads ''employees covered by this agreement shall be construed to mean, where already recognized . . . [operations] clerks'' while counsel for the General Counsel concedes that some of the operations clerks were covered under the approximately 220 local agreements prior to 1979, he asserts all were not, and that all were not intended to be, covered under those agreements. Counsel for the General Counsel argues that since the above recognitional language remained in the parties' two National Agreements, lasting approximately 8 years, they condoned the fact some operations clerks were covered by the two agreements while others were not. Simply stated, counsel for the General Counsel urges it cannot be concluded that the 1979 and/or 1982 agreements were intended to cover all operations clerks employed by the Company.

The Union contends it has always represented a majority of all operations clerks in that a majority of those clerks were indeed covered under the 1979 and 1982 National Agreements. Furthermore, the Union asserts it has continuously sought to have the minority of operations clerks not included in the unit be added thereto. The Union argues the complaint, as to it, should be dismissed in that no showing has been made that nonbargaining unit operations clerks were other than a minority of the overall operations clerks. Further, the Union argues that since the overall national bargaining unit consists of 108,000 unit employees, the small percentage of nonbargaining unit employees added under the 1987 collective-bargaining agreement constitutes nothing more than a de minimis adjustment of the composition of the unit in order ''to establish national uniformity, and to clarify [the Company's] preexisting de facto recognition of the majority of these operations clerks, already bargaining unit members.'' Such, the Union contends, is consistent with the policies and purposes of the Act and as such does not constitute an unfair labor practice.

The Union argues that if the instant case is to be viewed as an accretion case, it is undisputed that a majority of the employees in the classifications to be accreted were already bargaining unit employees. As such, the Union argues the Board's general doctrine of denying accretion in a situation where an employee classification has previously been exluded from a collective-bargaining agreement should not apply to, or control, the disposition of the instant case. The Union urges the Board's line of cases precluding accretion where the employee classification has been excluded are clearly distinguishable in that in none of those cases were the employee classifications to be accreted already bargaining unit members as was stipulated to be the case herein. The Union urges that since the employees brought into the unit by the 1987 agreement constituted a relatively small percentage of the overall unit, and the employees shared a sufficient community of interest with the unit employees they should be considered an accretion to that unit especially in light of the fact the accreted employees do not have a community of interest sufficiently separate and distinct so as to preclude their accretion into the bargaining unit. In this regard, the Union notes the operations clerks involved have historically been included in the unit in most parts of the country because their job functions are integrated with the job functions of other members of the bargaining unit. The Union urges that as a matter of law the inclusion of the unrepresented operations clerks into the existing bargaining unit in 1987 constituted a proper accretion to the existing bargaining unit and as such the complaint as to it should be dismissed

The Company contends the agreement to add new language to the ''Employees Covered'' section of the 1987 National Agreement that treated *all* operations clerks as bargaining unit members, merely clarified the fact *all* operations clerks had been bargaining unit members under the 1979 and 1982 agreements. The Company asserts the Union always interprets the recognition clauses of the prior agreements to mean *all* operations clerks were bargaining unit employees. The Company claims the Union always tried, although unsuccessfully until 1987, to persuade it of the correctness of its interpretation of the prior agreements. The Company asserts the Union based its interpretation on the fact that when the first National Agreement was executed in 1979, the Union, through its locals in various parts of the country already represented a majority of all operations clerks employed by the Company. The Company contends it finally agreed to the Union's interpretation because the added language covered something that factually already existed. Thus, the Company urges it did not violate the Act by agreeing to language in the 1987 agreement that reflected what in fact already properly existed.

The Company, like the Union, contends that assuming accretion principles apply to the instant case, the operations clerks were lawfully accreted into the bargaining unit in 1987 because prior Board cases regarding accretion of previously excluded classifications are not applicable and because a community of interest with unit employees is clearly present such as to warrant an accretion finding. The Company like the Union, points out that in those cases where the Board has treated the accretion issue in the context of a classification previously excluded, none of the classifications to be accreted had ever been part of the bargaining unit. The Company asserts the instant case is one of first impression in that a majority of the employees in the classifications to be accreted are already members of the bargaining unit. The Company urges that the instant case is an accretion case, if at all, only in the narrowest sense—what is to be accreted is a group of employees who work in job classifications which are already a part of the unit. The Company contends a finding of lawful accretion in the instant case will advance the Board's policy of promoting the peaceful resolution of industrial disputes through the collective-bargaining process. The Company urges the dismissal of all complaint allegations against it.

C. *Analysis, Discussion, and Conclusions*

I reject the Company's and Union's position that by adding language to the 1987 National Agreement to treat *all* operations clerks as bargaining unit members, the parties were merely clarifying the fact *all* had been bargaining unit members under the two previous National Agreements. I likewise reject the contention the language change was nothing more than a de minimis adjustment of the unit composition. The evidence establishes that prior to the first (1979) National Agreement, some union locals considered operations clerks to be a covered under the local agreement while others did not. The language ''where already recognized'' regarding employees covered under the 1979 agreement, which language was retained in the 1982 agreement, indicates the parties inntended to maintain the status quo—that is in those locations where operations clerks were previously considered to be in the unit such would continue to be so while those considered to be included would remain in that status. The Company and Union having failed to demonstrate that the additional recognitional language in the 1987 agreement was simply a clarification of what in fact already existed, I shall turn to the central issue of whether the employees added to the unit in 1987 constituted a lawful accretion.

The court in *Lammert Industries v. NLRB*, 578 F.2d 1223, 1225 fn. 3 (7th Cir. 1978) noted:

> An accretion is simply the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. The additional employees are then properly governed by the unit's choice of bargaining representative. *NLRB v. Food Employers Council, Inc.*, 399 F.2d 501, 502–503 (9th Cir. 1968).

In *King Radio Corp.*, 257 NLRB 521 at 525 (1981), the judge with approval, noted the Board weighs a variety of factors in determining whether a particular group of employees constitute an accretion to an existing unit. Such factors are: (1) integration of operations; (2) centralization of administration and management control; (3) geographic proximity (4) similarity of working conditions and skills; (5) labor relations control; (6) common or separate supervision; and (7) bargaining history. Where there are factors militating toward and against accretion a balancing of the factors is necessary. That is, the Board must balance the right of employees to express their desires concerning representation against the policy favoring continuity in collective-bargaining relationships. Although the Board generally follows a somewhat restrictive rather than expansive policy in finding an accretion in order to ensure employees the fullest freedom in expressing their rights under the Act, it is not hesitant find an accretion where the facts warrant such. The bottom line is that the Board will very carefully weigh every factual situation in balancing the implicit statutory policy of stability in bargaining relationships against the expressed satutory right of employees, as set forth in Section 7 of the Act, to choose to refrain from engaging in collective bargaining.

In applying the Board's *traditional* community of interest analysis to the instant case, I am persuaded the facts overwhelmingly militate in favor of a finding of accretion. The facts establish the Company's packaged delivery operations are highly integrated with the operations clerks fulfilling vital and necessary roles at most all stages of the Company's operations. When packages are brought from customers to hub or air hub centers and unloaded, operations clerks work alongside the unloaders and sorters rewrapping and/or retaping packages. Packages that are damaged beyond delivery and are to be returned to the customers are processed by operations clerks in the return clerks classification. The return clerks insure the packages, as well as the related paper work, are prepared and processed so loaders can reload the packages and drivers can return the packages to the customers. Likewise, operations clerks assist loaders, unloaders, and sorters in ascertaining correct and complete addresses for packages brought to the hub without correct, proper, or complete addresses. The parties stipulated the operations clerks perform their work ''alongside sorters, loaders, and drivers [unit members] in processing packages to be transported'' by the Company. The working conditions of the operations clerks are identical to other inside employees that are unit members. The operations clerks at each hub or air hub report to the same supervision as do bargaining unit members. As more fully discussed, inter alia, the parties' bargaining history demonstrates operations clerks at various locations have traditionally been part of the bargaining unit. Simply stated, the functions performed by the operations clerks are the same as those performed by bargaining unit members, namely, processing packages through the system for ultimate delelivery to the customers. The operations clerks who were not considered as already being in the unit constituted a small percentage of the overall unit and do not form a separate unit of their own. Absent some valid reason for not applying the *traditional* community of interest analysis to the instant case, I would find the operations clerks that were not previously included in the bargaining unit but that were brought into the unit by the 1987 National Agreement were properly merged into or included in the overall unit by accretion.

There are, however, a line of cases in which the Board has not permitted accretion where the classification to be accreted has been excluded from the unit by a collective-bargaining agreement. See, e.g., *Sterilon Corp.*, 147 NLRB 219 (1964); *Laconia Shoe Co.*, 215 NLRB 573 (l974); *King Radio Corp*., supra; and *Color Tech Corp*., 286 NLRB 476 (1987). Counsel for the General Counsel, as noted earlier, urges this line of cases controls the instant case while the Company and Union argue to the contrary. A closer look at the above cases is necessary. The Board, for example, in *Laconia Shoe*, supra, adopted the judge's decision wherein he held:

> The single most crucial factor in any ''accretion case'' under settled Board law [the judge cited *Sterilon Corp*., as the ''lead'' case in this respect] is whether the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an ensuing contract, or, having come into existence, has not been part of the larger unit to which their accretion is sought or granted.

The judge in *Laconia Shoe*, supra, further held:

> When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an eletion or a showing of majority among them even if no other union could attain representative status for them.

In *Sterilon Corp*., supra, which was relied on by the judge in *Laconia Shoe*, supra, the Board held two factors needed to be present in order to preclude or bar a finding of accretion. Namely, prior exclusion from a unit and acquiescence therein by the union involved. In *Sterilon Corp*., supra, the union had never attempted during the 11-year existence of the unit to have the disputed classification included in the unit. The judge in *Laconia Shoe*, supra, did not specifically state that both of the above factors had to be present to preclude or bar an accretion finding but he did consider acquiescence to be a relevant factor when he considered and rejected a contention the union's failure to seek to represent the disputed classification was due to the union's belief the disputed classification was already included in the unit. In *Color Tech*, supra, the judge considered and rejected a contention that any acquiescence was not knowing because the union was unaware of the character of the work being performed by the classification sought to be accreted. Although it is perhaps not as clear as the parties might wish, I am persuaded the Board still adheres to the teachings in *Sterilon Corp.*, supra, that both prior exclusion from a unit and acquiescence by the union involved must be present to bar an accretion.

All of the parties acknowledge the case sub judice differs from the above cases in that in none of the above cases was the Board confronted with the situation where a large percentage of the employees in the classifications to be accreted were already members of the bargaining unit. Stated differently, none of the classifications to be accreted in the above-cited cases had ever been a part of the bargaining unit. Counsel for the General Counsel contends that since an identifiable group of employees had been excluded for two consecutive contracts (1979 and 1982), the principles of *Laconia Shoe*, supra, should apply notwithstanding the fact that approximately half the employees in the same job classifications (operations clerks) had been treated as being in the unit. Counsel for the General Counsel appears to be asserting that because the recognition language in the 1979 and 1982 National Agreement, covered only those operations clerks already in the unit that the status of the remaining operations clerks should be governed by the principles established in the above-cited cases. The Company and Union urge such cases are not controlling herein. In support of its position that the above-cited cases should not be controlling the company points with emphasis to the fact the classifications to be accreted in the instant case have, from the very first National Agreement, been included in the unit with only some employees at some locations being considered as not being included. The Company argues the proper subject of focus in an accretion case is the classification accreted and not the employees per se. In this regard and in further support of its position, the Company points out the parties stipulated that the pre-1987 bargaining unit included employees in the operations clerks classifications. Thus, the Company, as noted earlier, urges the instant case is an accretion case in only the narrowest sense—what is to be accreted is a group of employees who work in job classifications which are already a part of the national unit. All parties agree the instant case is one of first impression.

In what appears to be an absence of Board precedence, I am peruaded a determination of the lawfulness of the accretion issue herein will require consideration of the various purposes (expressed and implied) of the Act—some of which have been alluded to earlier in this decision. A finding of a lawful accretion herein will provide stability in the bargaining relationship and will lessen the potential for union-employer discord. I note the issue of the inclusion of *all* operations clerks in the national unit had been a constant bone of contention between the parties until the 1987 agreement. Eliminating this type of strife between the Company and the Union, in my opinion, effectuates the purposes of the Act. This is especially so where, as is the case here, the classifications to be accreted are already included in the unit with a large percentage of the employees in those classifications already covered under prior agreements. Furthermore, the record reflects that only one objection, (the Charging Party herein), has been raised to *all* operations clerks being included in the unit of approximately 108,000 employees. A finding of an accretion in the instant case will not, in my opinion, improperly disenfranchise certain of the operations clerks at certain locations inasmuch as the job classifications involved have been covered under the National Agreements since the first such agreement was executed in 1979. Inasmuch as a strong community of interest exists between the operations clerks to be a accreted and the operations clerks already in the unit and inasmuch as a finding of accretion would favor continuity in the collective-bargaining relationship and eliminate the potential for discord, I conclude the above-cited cases do not constitute an impediment[11] to the

[11] Although it is not as clear as perhaps it could be, I am persuaded the Board requires a finding that both factors, prior exclusion and acquiescence, be present to bar an accretion finding. There was no acquiescence by the Union herein. It, through its various locals and at the national level,

Continued

finding, which I make, that the operations clerks not previously covered under the parties' National Agreements were lawfully accreted into the unit in 1987.[12]

Accordingly, inasmuch as I have found a lawful accretion herein, I shall dismiss all complaint allegations against both the Company and the Union.

continvously from the beginning objected to the fact the Company did not consider *all* operations clerks at *all* locals to be included in the national unit.

[12] A finding concerning majority status by the Union among those newly accreted operations clerks is not necessary and is not made.

CONCLUSIONS OF LAW

1. The Company, United Parcel Service, is an employer engaged in commerce within the meaning of 2(2), (6), and (7) of the Act.

2. Teamsters National United Parcel Service Negotiating Committee and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 385, AFL–CIO, its agent, is a labor organization within the meaning of Section 2(5) of the Act.

3. Neither the Company nor the Union has engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]